



IN THE MATTER OF

Ivy Ong and Carlo World Wide
Operations LLC,

Respondents.

Notice of Violation: NOV-07-02
OHA Docket No. NIGC 2007-1 (Pfister)

Civil Fine Assessment: CFA-07-02
OHA Docket No. NIGC 2007-2 (Pfister)

Final Decision and Order
January 18, 2008

On appeal to the National Indian Gaming Commission ("Commission") from a notice of violation and proposed civil fine assessment issued by the Chairman of the Commission to Ivy Ong and Carlo World Wide Operations LLC ("Respondents") for managing without an approved contract in violation of 25 U.S.C § 2711 and 25 C.F.R. §§ 533.1 – 533.3 and for improperly holding a proprietary interest in Indian gaming activity in violation of 25 U.S.C. § 2710 (b)(2)(A); 25 C.F.R. § 522.4(b)(1); and the gaming ordinance of the Seminole Tribe of Oklahoma, Seminole Nation Public Gaming Act, Title 15, Section 11.

Appearances

Ivy Ong and Carlo World Wide LLC, *pro se*.
Maria Getoff, Esq., and Rebecca Chapman, Esq., for the Chairman, National Indian Gaming Commission.

Presiding Official

Thomas K. Pfister, Office of Hearings and Appeals, U.S. Department of the Interior.

FINAL DECISION AND ORDER

After careful and complete review of the agency record and the Presiding Official's recommended decision, the Commission finds and orders that:

1. The Chairman issued a notice of violation, NOV-07-02, to Respondents on May 16, 2007, for managing without an approved contract and improperly holding a proprietary interest in Indian gaming activity.
2. Respondents filed a pleading styled as a "request for dismissal" of NOV-07-02 on June 13, 2007, and a proper notice of appeal from NOV-07-02 on June 15, 2007.
3. The Chairman issued a proposed civil fine assessment of \$5,150,000, CFA-07-02, to Respondents on June 15, 2007.
4. Respondents filed a notice of appeal from CFA-07-02 on July 13, 2007.
5. Respondents did not file the supplemental statements required by 25 C.F.R. § 577.3(c) for either appeal. Respondents thus failed to prosecute the appeals and have waived the right to bring them.
6. Respondents failed to respond to a series of communications and orders from the Presiding Official designated for these appeals and thus clearly and unequivocally abandoned the appeals.
7. The appeals of NOV-07-02 and CFA-07-02 are hereby dismissed with prejudice.
8. Notice of violation NOV-07-02 is upheld.
9. Civil fine assessment CFA-07-02 is upheld and made final.

DISCUSSION

We adopt the thorough and well-reasoned recommended decision of the Presiding Official, attached, and add only the following few comments. First, the Presiding Official correctly finds that the failure to file the supplemental statement required by 25 C.F.R. § 577.3(c) is, by itself, a sufficient reason to dismiss. A notice of appeal filed under 25 C.F.R. § 577.3(b) simply puts the Chairman and the Commission on notice of an appeal from a particular notice or order. It is the supplemental statement

that, despite its name, provides the substance of the appeal. The statement must state “with particularity the relief desired and the grounds therefore” and must include supporting evidence, if available. 25 C.F.R. § 577.3(c). The failure to file a supplemental statement is akin to a failure to file an appellate brief before a United States Court of Appeals. Such a failure to prosecute an appeal is a waiver of the opportunity for appeal presented by 25 C.F.R. Part 577. *See, e.g., Ahlberg v. HHS*, 804 F.2d 1238, 1243 (Fed. Cir. 1986); *ViAids Laboratories v. USPS*, 464 F. Supp. 976, 981-982 (S.D.N.Y. 1979).

Second, Respondents’ dismissal of their attorney and their subsequent utter failure to respond to a long series of correspondence and orders from the Presiding Official, not to mention the Chairman’s motion to dismiss, is an equally sufficient ground for dismissal. The record clearly and unequivocally shows, and the Presiding Official correctly found, that Respondents abandoned these appeals.

Third and finally, the Presiding Official correctly concluded that the Commission, and not a presiding official, has the authority to dismiss an appeal as a final agency action. Such authority is not given to a presiding official by 25 C.F.R. Part 577. Further, The Administrative Procedure Act (“APA”) 5 U.S.C. §§ 701 *et seq.*, makes the recommended decision of a presiding official contingent, and it becomes the decision of the agency only in the absence of further agency action. Similarly, the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (“IGRA”) makes only the appellate decisions of the Commission, not those of presiding officials, final agency actions. 25 U.S.C. §§ 2713(a)(2), 2714.

CONCLUSION

Respondents appeals of NOV-07-02 and CFA 07-02 are dismissed. NOV-07-02 is upheld. CFA-07-02 is upheld and made final.

It is so ordered by the NATIONAL INDIAN GAMING COMMISSION on this 18TH day of January, 2008.



PHILIP N. HOGEN
CHAIRMAN



NORMAN H. DESROSIERS
VICE CHAIRMAN



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
WELSA Hearings Division
Bishop Henry Whipple Federal Building
1 Federal Drive, Suite 3600A
St. Paul, MN 55111-4040



DEC 19 2007

National Indian Gaming Commission
1441 L St. NW
Ninth Floor
Washington, DC 20005

Re: *In the Matter of Ivy Ong and Carlo World Wide Operations, LLC*
NIGC 2007-1, NOV-07-02; NIGC 2007-2, CFA-07-02

Dear Madame or Sir:

In regard to the above-referenced appeals, please find enclosed a Recommended Decision that NIGC Chairman's Motion to Dismiss Appeals be Granted. Please advise as to whom I should send the Administrative Record.

Sincerely,

Thomas K. Pfister
Administrative Judge

cc:

Ivy Ong, Individually
Ivy Ong, Manager, Carlo World Wide Operations, LLC
(via facsimile transmission: (760) 806-4839)

Maria Getoff, Esq.
Rebecca Chapman, Esq.
National Indian Gaming Commission
National Headquarters
1441 L Street, NW, Suite 9100
Washington, DC 20005

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS

DEC 19 2007

IN THE MATTER OF)	Docket No. NIGC 2007-1
)	Notice of Violation: NOV-07-02
IVY ONG AND CARLO)	
WORLD WIDE OPERATIONS, LLC)	Docket No. NIGC 2007-2
)	Civil Fine Assessment CFA-07-02
Respondents.)	
)	Indian Gaming Regulatory Act,
)	25 U.S.C. §§ 2701-2721

**RECOMMENDED DECISION THAT NIGC CHAIRMAN'S
MOTION TO DISMISS APPEALS BE GRANTED**

The National Indian Gaming Commission (NIGC) Chairman has filed a Motion to Dismiss Appeals. The NIGC Chairman moves to dismiss the above-referenced appeals due to Respondents' failure to perfect and pursue their appeals. Respondents have not filed any response or opposition to the motion. The motion is well-taken. The Presiding Official recommends that the NIGC Commission grant the motion and dismiss Respondents' appeals with prejudice.

BACKGROUND

The above-referenced matters arise from Respondents' appeal of the NIGC Chairman's Notice of Violation (NOV), NOV-07-02, and from their appeal of the NIGC Chairman's Proposed Civil Fine Assessment (CFA), CFA-07-02.¹

The NIGC Chairman issued NOV-07-02 on May 16, 2007. On June 14, 2007, Respondents' counsel filed an Entry of Appearance and a Request for Dismissal. Respondents filed their appeal of NOV-07-02 on June 15, 2007. Respondents did not file the supplemental statement required to be filed within ten days of their appeal of NOV-07-02 pursuant to 25 C.F.R. § 577.3(c).

¹ While these appeals have not been consolidated generally, the appeals are based on common facts and legal issues and, therefore, are consolidated here for the purpose of this recommended decision.

On June 15, 2007, the NIGC Chairman issued CFA-07-02. Respondents filed their appeal of CFA-07-02 on July 13, 2007. Respondents did not file the supplemental statement required to be filed within ten days of their appeal of CFA-07-02 pursuant to 25 C.F.R. § 577.3(c).²

An Order Granting Withdrawal, issued November 9, 2007, allowed Kevin Combs, Esq. to withdraw as Respondents' counsel.³ Respondents were ordered to file, within ten days of the Order, a statement containing the following information:

- (1) indicating whether the Respondents intend to pursue their appeals of these matters and, if so, whether the Respondents intend to proceed individually or through counsel; and,
- (2) providing a service address and facsimile telephone number for each Respondent.

Respondents did not file the required statement.⁴

An Order Granting the Parties' Joint Motion to Extend Deadlines, issued August 23, 2007, set various pre-hearing deadlines. This Order set December 4, 2007, as the deadline for the following pre-hearing matters:

1. Date by which each party shall file a list containing the names of those persons it expects to call as witnesses at the hearing in this matter (including expert witnesses),

² Respondents' appeal of CFA-07-02 also contained a waiver of their right to a hearing within 30 days. On July 2, 2007, Respondents waived their right to a hearing within 30 days regarding their appeal of NOV-07-02. These waivers of the 30-day hearing requirement pursuant to 25 C.F.R. § 577.4(a), however, did not affect Respondents' obligation to file supplemental statements pursuant to 25 C.F.R. § 577.3(c).

³ The Order Granting Withdrawal directed Kevin Combs, Esq. to forward a copy of the Order to Respondents upon his receipt of the Order. A Certification filed by Kevin Combs Esq. on November 29, 2007, indicates that he successfully faxed the Order to Respondents on November 12, 2007.

⁴ In response to an Order to File Certification, issued November 28, 2007, Respondents' former counsel provided a facsimile number for Respondents, as a service address. Subsequent service upon Respondents by the Presiding Official has been to the facsimile telephone number provided by their former counsel. Even though the facsimile number provided by their former counsel appears to be forwarding to another telephone number, confirmation of successful receipt has been received. Service by facsimile is effective in these appeals. 25 C.F.R. § 577.6(b).

including the identification of the subject matter upon which such persons are expected to testify ("witness list"):

2. Date by which each party shall file a list identifying the exhibits it expects to offer into evidence at the hearing in this matter ("exhibit list"):
3. Date by which each party shall file reports of expert witnesses it expects to call as witnesses at the hearing in this matter (other than rebuttal witnesses):

Respondents did not comply with this deadline.

On December 6, 2007, the undersigned Presiding Official issued an Order to Show Cause. The Show Cause Order provided that Respondents' conduct, as referenced above, appears to constitute a waiver of their right to an oral hearing pursuant to 25 C.F.R. § 577.3(c). Therefore, Respondents were afforded five days to show cause as to why they have not waived their right to an oral hearing and to show cause as to why their appeals should not be forwarded to the NIGC Commission for a decision solely on the basis of written submissions.

The Show Cause Order also allowed Respondents five days to show cause as to why their Request for Dismissal should not be denied for failure to file a supporting brief.⁵ The Show Cause Order also suspended all remaining deadlines set forth in the Order Granting the Parties' Joint Motion to Extend Deadlines, issued August 23, 2007, until the issues in the Show Cause Order are resolved. Respondents did not file any response to, nor have they otherwise complied with, the Show Cause Order.⁶

Following the filing of the NIGC Chairman's Motion to Dismiss Appeals, the undersigned Presiding Official issued, on December 10, 2007, an Order Setting Briefing Schedule. This Order allowed Respondents five days to file a response to the NIGC Chairman's motion. The Respondents have not filed any response to the motion and, thus, have conceded the motion.

⁵ The Order Granting the Parties' Joint Motion to Extend Deadlines, issued August 23, 2007, set a deadline of November 12, 2007, within which Respondents could file an opening brief in support of their Request for Dismissal. Respondents have not filed an opening brief.

⁶ Given the recommendation that these appeals be dismissed, a ruling on the procedural and hearing related issues set forth in the December 6, 2007 Order to Show Cause is unnecessary and is reserved for a future ruling should the Presiding Official's dismissal recommendation be rejected and these appeals be remanded to the Presiding Official.

ANALYSIS

In his Motion to Dismiss Appeals, the NIGC Chairman asserts that Respondents' appeals should be dismissed with prejudice. The NIGC Chairman argues that Respondents have failed to perfect their appeals by not filing supplemental statements. The NIGC Chairman further asserts that Respondents have abandoned not only their right to a hearing, but their appeals generally, by their repeated failure to comply with orders. I agree.

Respondents' failure to comply with the Presiding Official's case management orders have interfered with the administration of these appeals. The NIGC Chairman has been prejudiced by Respondents' failure to file a statement regarding their intent to proceed with their appeals, which they were ordered to submit in the Order Granting Withdrawal. Respondents' failure to advise whether they intend to proceed with their appeals has wasted time and resources of the NIGC Chairman and the Presiding Official. The NIGC Chairman has been prejudiced by Respondents' failure to file their Witness List, Exhibit List, or Expert Report pursuant to the August 23, 2007, Order Granting the Parties' Joint Motion to Extend Deadlines. Respondents' failure in this regard has hampered the NIGC Chairman's ability to evaluate whether additional discovery is necessary.

The record substantially supports a finding that, in addition to waiving their right to an oral hearing, Respondents have, through their conduct, abandoned their appeals altogether. I also conclude that Respondents have failed to perfect their appeals of NOV-07-02 and CFA-07-02 by their failure to file the required supplemental statements. Therefore, the NIGC Chairman's motion should be granted and Respondents' appeals should be dismissed. This conclusion, however, raises a procedural issue regarding the proper mechanism for dismissal.

The regulations under which these appeals are adjudicated, 25 C.F.R. Part 577 -- APPEALS BEFORE THE COMMISSION ("Part 577"), are silent regarding the specific mechanism for dismissal of appeals in the present circumstances. Even so, certain provisions of Part 577 evidence a structure by which appeals, such as the instant ones, are to be adjudicated. For instance, a notice of appeal is to be filed with the NIGC Commission, rather than the Presiding Official. 25 C.F.R. § 577.3(a). The NIGC Commission then designates a Presiding Official to conduct a hearing. *Id.* § 577.4(a). Section 577.7(b), setting forth the authorities of a Presiding Official when conducting a hearing, confers on the Presiding Official the authority to dispose of procedural requests; to recommend decisions in accordance with § 577.14 of Part 577; and to take other actions authorized by the Commission consistent with Part 577; among other authorities, but does not provide any authority to grant dispositive motions. *Id.* § 577.7(b)(8), (b)(9), and (b)(10).

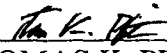
The only provision in Part 577 allowing an action of a Presiding Official to constitute final agency action is 25 C.F.R. § 577.9(d), pertaining to settlement agreements. This section provides that the Presiding Official's certification of consent findings in a settlement agreement shall constitute dismissal of the appeal and final agency action. Thus, the overall

structure of Part 577 leads me to conclude that the NIGC Commission, not the Presiding Official, has sole authority to grant a motion to dismiss and dismiss an appeal as final agency action. Part 577 confers on the Presiding Official only the authority to make recommendations to the NIGC Commission regarding the granting of a dispositive motion, such as the NIGC Chairman's Motion to Dismiss Appeals.⁷

RECOMMENDATION

Therefore, the Presiding Official recommends that the NIGC Commission grant the NIGC Chairman's Motion to Dismiss Appeals and dismiss Respondents' appeal of NOV-07-02 with prejudice and dismiss Respondents' appeal of CFA-07-02 with prejudice.

Done at Saint Paul, Minnesota



THOMAS K. PFISTER
Administrative Judge
Presiding Official

NOTICE

25 C.F.R. § 577.14(b) provides as follows:

(b) *Filing of objections.* Within ten (10) days after the date of service of the presiding official's recommended decision, the parties may file with the Commission objections to any aspect of the decision, and the reasons therefor.

⁷ As opposed to the denial of a motion to dismiss, which a Presiding Official could issue because the denial of such a motion does not constitute final agency action.

CERTIFICATE OF SERVICE

I hereby certify that on DEC 19 2007, a copy of the foregoing was sent, via facsimile transmission, to the following:

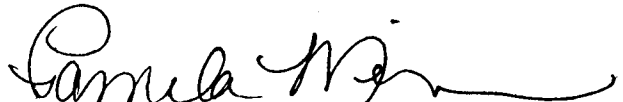
Ivy Ong, Individually
Ivy Ong, Manager, Carlo World Wide Operations, LLC
(760) 806-4839

and a copy was sent, via facsimile transmission and first class mail, to the following:

Maria Getoff, Esq.
Rebecca Chapman, Esq.
National Indian Gaming Commission
National Headquarters
1441 L Street, NW, Suite 9100
Washington, DC 20005

and a copy was sent, via first class mail, to the following

National Indian Gaming Commission
1441 L St. NW
Ninth Floor
Washington, DC 20005



Employee
U.S. Department of the Interior

CERTIFICATE OF SERVICE

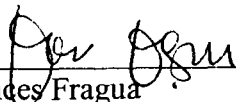
I, FRANCES FRAGUA, certify that the foregoing Final Decision and Order and Recommended Decision to Respondent's appeal of NOV-07-02 and CFA 07-02, *In the Matter of Ivy Ong and Carlo World Wide Operations LLC*, was sent by facsimile transmission and U.S. Postal Service First Class mail this 18th day of January, 2008, to the following:

Ivy Ong, Individually
Ivy Ong, Manager, Carlo World Wide Operations, LLC
c/o Brian Ong
1442 Irvine Avenue
Newport Beach, California 92660
Fax #: (760) 806-4839

Thomas K. Pfister, Administrative Judge
Presiding Official
United States Department of the Interior
Office of Hearings and Appeals
WELSA Hearings Division
Bishop Henry Whipple Federal Building
1 Federal Drive, Suite 3600A
St. Paul, MN 55111-4040
Fax #: 612-725-1856

and a copy Hand-Delivered to:

Maria Getoff, Esquire
Rebecca Chapman, Esquire
National Indian Gaming Commission
Office of the General Counsel
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